CHANCELLOR KENT.

CONCERNING ERECTION OF A MONUMENT TO HIS MEMORY.[1]

The two great figures eminent over all in our early constitutional, judicial and legal history are those of John Marshall and James Kent. I said early history, and this is true; and it is largely true that their pre-eminence remains down to the present.

They were contemporaries. Marshall was born in Virginia, in 1755; Kent, in New York, in 1763. Both had reached manhood at the time of the adoption of the Constitution of the United States. Marshall had served for six years as a soldier in the War of the Revolution, and in the pitiable weakness of the Confederation he formed his well-known principles as to a national government, strong enough to protect itself against the world and against the encroachment of its several members. Kent, younger than Marshall, was too young to take any part in the War of the Revolution, but having been settled as a young lawyer at Poughkeepsie, he was present in the summer of 1788, when the Constitution, by the narrow margin of three,—30 to 27—was ratified by the State of New York, largely through the labors by tongue and pen of Alexander Hamilton. Chancellor Kent has himself left on record his presence at the opening of the Convention, in June, and the intense public interest in the proceedings from day to day, and of his attendance upon the Convention daily and steadily during the entire six weeks of the session. Both Marshall and Kent not only saw the birth of the Republic, but witnessed the feebleness and perils, many and great, which attended its earlier history, more than once threatening its continued existence. The lives of both were graciously prolonged in health and unclouded intellectual vigor to an extreme age. Chief Justice Marshall died at the age of eighty years in the discharge of his duties as Chief Justice of the Supreme Court, in Philadelphia, July 6, 1835, after a continuous

[1]Address before New York State Bar Association at Albany, January 21, 1903.

service in that position of over thirty-four years. Chancellor Kent died at the age of eighty-four, in the City of New York, on the 12th day of December, 1847.

The first centennial commemoration of Marshall Day, February 4, 1901, is fresh in the professional and public mind. It was fitly celebrated by appropriate addresses and proceedings in thirty-seven States and Territories of the Union, Congress, State Legislatures, Universities and other institutions of learning, and the various Bar Associations of the several states and territories participating in the honors thus paid to the memory of the Great Chief Justice, and the addresses relating to his career and public services were delivered by the leaders of the Bar and by eminent Judges, scholars and statesmen. This tribute was deserved. It expressed the universal conviction that the establishment of the principle of nationality in the Constitution of the United States, and the final ascendency of that principle so that it is no longer disputed by any class or party, and the establishment of the constitutional authority and functions of the Supreme Court in the public respect and confidence, are due more to Marshall than to any other man. Such a universal, spontaneous and voluntary tribute to a Judge, who had been in his grave for more than half a century, is absolutely unique, reflecting credit upon the Bar and the people, who expressed their sentiments and gratitude on such an adequate and magnificent scale. It so happened that Marshall's distinctive work was that of expounding the Constitution of the United States. His great judgments determined its boundaries and established its fundamental principles. In this great work, as delicate as it is important, there were no precedents or authorities to guide him, and from necessity he was compelled almost wholly to rely on his own intellectual resources, and thus became justly entitled to be regarded, not only as an expounder of the Constitution, but essentially the creator of our constitutional jurisprudence.

Chancellor Kent has as strong a title as Chief Justice Marshall to the professional and public regard, gratitude and veneration for his genius, character and labors. Marshall's field was the development of the Constitution of the United States; Kent's was the field of general juris-

prudence, and in this he rendered services, throughout a judicial career extending from 1798 to 1823, which are inferior in value and importance to Marshall's only, if at all, because the development and adaptation of the system of jurisprudence from the English principles and models may be regarded as less vital and important than the work of expounding and developing the principles of the Constitution of the Union.

As in the case of Marshall, so in that of Kent, in order to appreciate him properly we must view the circumstances under which he wrought. Kent's whole life was an undeviating and continuous preparation for the work which, as judge, chancellor and author, made him justly famous. His love of learning and books, early manifested, continued to the end, dominating and unconquerable. Pinkney's well-known remark concerning Marshall, that "he was born to be the Chief Justice of any country in which Providence should cast his lot," would apply with equal force and justice to Chancellor Kent. He was not fond of the contentions of the Bar, but he never wearied in the study and contemplation of the writings and labors of lawyers and judges of different countries, ancient or modern. His studies liberalized, broadened and enlightened his mind to its utmost verge, but his practical experience kept him from being a visionary or doctrinaire. He had a varied experience in public affairs. He served for three years in the Legislature of his State; he was Recorder of the City of New York; he was a Master in Chancery, and he delivered law lectures in Columbia College—all before his accession to the bench of the Supreme Court of the State in 1798. On that bench he served for sixteen years, when he was appointed Chancellor in 1814, continuing in the latter position until his compulsory retirement at the age of sixty, in 1823. He was a member of the State Constitutional Convention of 1821, which fixed the early limit of sixty as the age at which a judge would be obliged to retire. After his retirement from the bench in 1823, he was a second time appointed to a professorship in Columbia College, to which appointment we doubtless owe, as indeed Councellor Kent acknowledged to be the fact, the production of his Commentaries. Twenty-five years of his happy

and peaceable domestic life were passed in the City of Albany. The rest of his active life was mainly spent in Poughkeepsie and in the City of New York.

Now, as above remarked, in order properly to estimate the value of Chancellor Kent's public and judicial services, we must consider the *res gestæ*—the situation and circumstances under which they were rendered, as well as the character of the services themselves. Kent went on the Supreme Bench of the State of New York in 1798; Marshall on the Supreme Bench of the United States in 1801. At that time there was scarcely any record of our jurisprudence, national or State. Chief Justice Waite has drawn a very exact and striking picture of the condition of the Federal jurisprudence in these words:

"Mr. Justice Story, in an address delivered on the occasion of Marshall's death, speaks 'of those exquisite judgments, the fruits of his own unassisted meditations, from which the court has received so much honor,' and I have sometimes thought even the Bar of the country hardly realizes to what extent he was, in some respects, unassisted. Marshall took his seat on the bench at the February term in 1801. The court had then been in existence but eleven years, and in that time less than one hundred cases had passed under its judgment. The engrossed minutes of its doings covered a little more than 200 pages of one of the volumes of its records, and its reported decisions filled but 500 pages of three volumes of the reports published by Mr. Dallas. The courts of the several colonies before the Revolution, and of the States afterwards, had done all that was required of them, and yet the volumes of their decisions published before 1801 can be counted on little more than the fingers of a single hand, and if these and all the cases decided before that time, which have been reported since, were put into volumes of the size now issued by the Reporter of the Supreme Court, it would not require the fingers of both hands for their full enumeration. In short, the nation, the constitution and the laws were in their infancy."

Chancellor Kent draws this picture of the condition of the law in New York in 1793.

"The progress of jurisprudence was nothing in this State prior to the year 1793. There were no decisions of any of the courts published; there were none that contained any investigation. * * * The country Circuit Courts were chiefly occupied in plain ejectment suits and in trying criminals in the Courts of Oyer and Terminer. In short, our jurisprudence was a blank when Hamilton and Harrison first began by their forensic discussions to introduce principles and to pour light and learning upon the science of law."

The condition was but little improved in 1798, concerning which Kent wrote:

"In February, 1798, I was offered by Governor Jay and accepted the office of youngest Judge of the Supreme Court. This was the summit of my ambition. My object was to retire back to Poughkeepsie and resume my studies and ride the Circuits and inhale the country air and enjoy *otium cum dignitate.* I never dreamed of volumes of reports and written opinions. Such things were not then thought of. * * * When I came to the bench there were no reports or State precedents. The opinions from the bench were delivered *ore tenus.* We had no law of our own and nobody knew what it was. I first introduced a thorough examination of cases and written opinions. * * * This was the commencement of a new plan, and then was laid the first stone in the subsequently erected temple of our jurisprudence."

In a confidential letter, written to a member of the bar of Nashville, Tennessee, the Chancellor, after stating the extent of his studies, says:

"I gradually acquired preponderating influence with my brethren, and the volumes in Johnson after I became Chief Justice in 1804 show it. I remember that in the 8th Johnson all the opinions for one term are "*per curiam.*" The fact is I wrote them all and proposed that course to avoid exciting jealousy. * * * English authority did not stand very high in those early, feverish times, and this led me a hundred times to attempt to bear down opposition or shame it by exhaustive research and overwhelming authority. Our jurisprudence was on the whole improved by it."

In addition to the duties of the court *in banc*, Chancellor Kent records that he rode his Circuits, and in these sixteen years he held 140 courts and tried 1,755 cases. The value of such a weighty and varied judicial experience is incalculable, and he carried all of it with him when he was appointed Chancellor in 1814.

The circumstances under which he entered upon the office of Chancellor are told with great frankness and naiveté in the Tennessee letter above mentioned. He says:

"In 1814 I was appointed Chancellor. The office I took with considerable reluctance. It had no charms. It is a curious fact that for the nine years I was in that office there was not a single decision, opinion or dictum of either of my two predecessors, from 1777 to 1814, cited to me or even suggested. I took the court as if it had been a new institution and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable under our Constitution. This gave me grand

scope and I was checked only by the revision of the Senate, or Court of Errors. I opened the gates of the court immediately, and admitted, almost gratuitously, the first year, eighty-five counsellors, though I found there had not been thirteen admitted for thirteen years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Chancery Reports."

Thus it happened that Chancellor Kent opened the portals of Chancery and commenced the erection of a splendid structure of equity jurisprudence, just as Marshall opened the portals of the Constitution and commenced the erection of the superstructure of our constitutional law. Kent was thus essentially a pioneer in the creation, or, if you please, the development and adaptation of equity law to the situation and circumstances of this country. It was not until 1817 that Chancellor De Saussure published the first volume of equity reports which ever appeared in this country, which was three years after Kent's appointment as Chancellor. During Kent's chancellorship, from 1814 to 1823, his seven volumes of Chancery Reports were given to the world.

After Kent had reached the constitutional limit of sixty years he gave himself up to the preparation, and from time to time to the revision, of his Commentaries on American Law. He commenced the work of composition in the sixty-third year of his age. The first volume appeared in 1826, the second in 1827, the third in 1828, and the fourth in 1830. Considering the excellence of the work, the rapidity of its production is remarkable, and can only be accounted for by the thoroughness of the author's preparation for his work. Its success was immediate and deserved. Bar and bench in this country and Europe vied with each other in expressing their sense of its value, excellence and influence. Its great reputation remains undiminished, the work has reached the fourteenth edition, and there is no evidence that it is likely to become obsolete, or to be displaced.

The success and popularity of the work was undoubtedly extremely grateful to the Chancellor, but it may have occurred to him, as it has to other Judges, for example Mr. Justice Story, that it was not a little remarkable that the production of a work or works of an elementary or institutional nature should give to the author a more extended

fame and a more illustrious name than many times the same number of years devoted with equal ability and learning to the performance of judicial duties.

The system of equity jurisprudence as Kent developed, expanded and adapted it to the situation and circumstances of this country has become universal throughout its limits, and Chancellor Kent is justly entitled to the distinction or descriptive appellation of the creator of the equity system of this country, as Marshall is entitled to that of the creator of our constitutional jurisprudence.

Another parallel between Marshall and Kent consists in the irreproachable simplicity and purity of their private characters. Tennyson's lines in the Wellington Ode:

> "And, as the greatest only are,
> In his simplicity sublime"

apply equally to these great judicial magistrates. There is nothing more charming in the history of the great men of our profession than the domestic life of Marshall and Kent. It is idyllic, and no one can arise from a study of the lives of these great men without loving the man as much as he admires the magistrate.

Considerations such as these, which have been so imperfectly expressed, led the writer in his Marshall Day Address at Albany to remark that, aside from Marshall's services in the field of federal constitutional law, there were other English and American judges who have as wide or wider fame than Marshall—Story, Shaw and Kent, and to state that, having mentioned Chancellor Kent, the hearers would perhaps give him leave, in this capital city and before the bar of the State, to repeat what he had elsewhere said, that,

> "As a judge and author, Kent will not suffer when compared with the greatest names which have adorned the English law. The American Bar and people venerate his name and character. Simple as a child in his tastes and habits throughout his tranquil and useful life; more than any other judge the creator of the equity system of this country; the author of Commentaries which, in accuracy and learning, in elegance, purity and vigor of style, rival those of Sir William Blackstone, his name is admired, his writings prized, and his judgments at law and in equity respected in every quarter of the globe wherever in its widening conquest the English language has carried the English law."

No writer has considered the respective powers and duties of the Federal and State judiciaries so satisfactorily as Chancellor Kent, whose chapters on that subject are characterized by precision, justness and elegance. He pointed out that there was enough in the jurisdiction of the several States to cheer and animate the cultivation of the science of jurisprudence therein, observing that

"The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and, we might almost say, the exclusive cognizance of the State governments. We look essentially to the State courts for protection to all these momentous interests. They touch, in their operation, every chord of human sympathy, and control our best destinies."

The speaker suggested that under the auspices of the Bar Association of the State we should have a James Kent Day, in order that we may suitably make manifest our appreciation of the great services which he rendered to general jurisprudence, and particularly to the jurisprudence of the State of New York, and this in the hope that it might result in a statute in honor of his memory, either here in the capital city, where he lived and labored for twenty-four years, or in the City of New York, where his Commentaries were written and where he died.

As the unenvied and undisputed title of Marshall is that of The Great Chief Justice, so equally the undisputed and unenvied title of Kent is that of The Great Chancellor and The Great Commentator. This is his double title to his just renown and fame.

The most valuable possession of a State or nation is its great men—men who have rendered to it enduring and useful services—services whose benefits and blessings have the quality of immortality by continuing long after those who have rendered them have closed their earthly career. One great, conspicuous merit of Kent's Commentaries is that they are equally valuable to the student, to the active practitioner and to the laborious and inquiring judge. The late eminent Mr. Justice Stephen, in his *History of the Criminal Law of England*, says that:

"If we except the Commentaries of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to

describe the whole law of any country possesses anything like the excellent merits of Blackstone's work."

Such is the consensus of opinion in this country, as elsewhere.

It may be true that Chancellor Kent's true monument is to be found in the record of his life, in the consummate judgments which he rendered at law and in equity, and in his celebrated Commentaries, and that these will endure through successive generations and survive any material monument that may be erected to his memory. It it undoubtedly true, to use the eloquent words of Charles Sumner in a letter to Chancellor Kent, that

"The mighty tribute of gratitude is silently offered to you from every student of the law in our whole country. There is not one who has found his toilsome way cheered and delighted by the companionship of your labors, who would not speak as I do, if he had the privilege of addressing you."

Chancellor Kent left behind him as man and magistrate an example difficult indeed to follow, impossible to surpass, worthy of profoundest reverence. His influence on our laws and jurisprudence ended not with his life, but in all our wide and extensive domain spreads as the generations come and go, undivided, and operates unspent. As the inheritors of his example and of the benefits of his labors we owe him an uncanceled debt of gratitude. No! Rather we owe it to ourselves and to those who shall come after us to make manifest by some fitting memorial our appreciation of our obligations. It is not enough to recognize such a duty by words. The practice of all nations in all ages has been to exhibit their gratitude for great characters and great services by some fitting and enduring memorial which shall stand in the eyes of all observers, not only as a memorial to him to whom it is erected, but also of the sentiments of gratitude, veneration and esteem of those by whom it is erected. It thus serves a double purpose—a memorial to the honor of the dead, and at the same time a memorial of duty performed by the living.

When the subject of the erection of a suitable statue to the memory of Chancellor Kent was approved by this Association at its last meeting, a special committee was ap-

pointed consisting of one member from each judicial district to take the matter in charge and bring it to the attention of the Legislature. The suggestion was also approved by the Albany Bar Association. The committee has made some progress in the way of the execution of their duties, and intends to prosecute the work with zeal and vigor.

In conclusion it is respectfully suggested that this same committee be continued, or another appointed, with larger powers than those with which the committee was clothed by this Association at its last meeting. They suggest that the Association shall pass resolutions to the effect that the American Bar Association shall give its weighty sanction to the proposal to erect a monument to Chancellor Kent, and asking the co-operation of the Legislature of the State, the State and national courts, the State, city and other bar associations, the universities and other institutions of learning and the lawyers and students of the law throughout the land, in the erection of a monument in the City of Albany worthy of the genius, labors, name and character of Chancellor Kent.

JOHN F. DILLON.